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No. 87-1039

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LUIS O. JUARBE ANGUEIRA,

Petitioner,

v.

LUIS RAFAEL ARIAS, Director of the Public Buildings Authority,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether for purposes of the qualified immunity defense raised by respondent in a 42 U.S.C. § 1983 civil rights action based on an alleged politically based discharge that violates the First Amendment, the determination of what constitutes "clearly established" federal constitutional law should be evaluated exclusively by reference to the opinions of the Supreme Court of the Commonwealth of Puerto Rico and without considering the considerable body of case law from circuit courts of appeals and district courts.

PARTIES TO THE PROCEEDINGS BELOW

The parties before the Court of Appeals for the First Circuit were Luis O. Juarbe Angueira, Petitioner herein; and Luis Rafael Arias, the Executive Director of the Public Buildings Authority of the Commonwealth of Puerto Rico, Respondent herein. Respondent was sued in both his official and personal capacities.

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BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for writ of certiorari filed by petitioner, seeking review of the First Circuit's judgment in this case. The opinion upon which that judgment is based is reported as *Juarbe-Angueira v. Arias*, 831 F.2d 11 (1st Cir. 1987) ("*Juarbe Angueira*") (Breyer, J.). *See also* Ptn. App. A1-A16.

STATEMENT OF THE CASE

The question presented in this case arose from a civil rights action filed by petitioner that challenged the authority of the newly elected government of the

Commonwealth of Puerto Rico to appoint, to a limited number of policymaking positions, those public officials that formulate and implement the policies that have been sanctioned by the electorate. The relevant facts of this case are adequately set forth in the opinion of the court of appeals, *see* 831 F.2d at 12, and require little elaboration. Respondent in this case is the Executive Director of the Public Buildings Authority ("PBA") of the Commonwealth of Puerto Rico.[1] He was appointed to that office during the first two months of 1985 by the administration that assumed power in January, 1985, after the Partido Popular Democratico (PPD—Popular Democratic Party) defeated the Partido Nuevo Progresista (PNP—New Progressive Party) in the November, 1984 gubernatorial election.[2]

Petitioner was a Regional Director of the Aguadilla Region of the PBA in Puerto Rico. He served under the Auxiliary Executive Director for Operations Area, two levels down from the Executive Director. He supervised 54 employees, including two building administrators, two conservation supervisors, four clerical personnel employees, nine conservation technicians, and 37 conservation workers. Thus, he held a fairly

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[1] The PBA is an instrumentality of the of the Commonwealth of Puerto Rico attached to the General Services Administration. P.R. Laws Ann. tit. 22, § 902 (1965), Reorganization Plan No. 2 of 1971, § VII, App. I of P.R. Laws Ann. tit. 3, § 933 (1978). The PBA has a broad range of functions, including the design, construction and operation of schools, public hospitals and other health and social welfare facilities, office buildings, courthouses, and any other physical facility related with government services. P.R. Laws Ann. tit. 22, § 903 (1965).

[2] The PNP was the ruling party in Puerto Rico from 1977 to 1985.

high-level position within the agency. *See*, 831 F.2d at 15.

The inherent powers and functions of a Regional Director are contained in a job description as to which there was no disagreement at any of the hearings held in this case. The job description contains many significant policy-making duties, that are described in the First Circuit's opinion. *See* 831 F.2d at 15. The inherent powers contained in that job description showed that the Regional Director proposes, establishes, and implements public policy on subjects that potentially involve political issues. For instance, he directs the "Authority's projects under construction," directs, plans, and supervises all "maintenance and conservation services for the Authority's buildings in [their] region." *Id.* He also prepares a budget for the region, "a matter likely to be of considerable interest to the elected and other government officials who work there." *Id.* at 16. Similarly, the position has well-defined representative and spokesperson functions, since the Regional Director is the "official representative[] of the Authority and its Executive Director in [the] region in regards to the relationship to be established with municipal officers, other Government representatives and the general public." 831 F.2d at 15. Moreover, the agreed to functions demonstrate that the Regional Director is privy to confidential information.

The position of Regional Director is closely related to partisan political interests or concerns. Regional Directors are the top line officers or "the alter ego of the Executive Director [of the PBA] at the regional level". *Accord, Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 245 (1st Cir. 1986), *cert. denied*,

__ U.S. __, 107 S. Ct. 1888 (1987). Moreover, each region is a microcosm of the larger agency, and the duties of each Regional Director are representative of the duties of the agency's Executive Director.

The political concerns or interests of the PBA can hardly be disputed. The statute creating the PBA defines its duties as "provid[ing] lodging facilities for schools, 'Health and Social Welfare Facilities', offices, quarters, courts, warehouses, shops and other physical facilities of the Commonwealth, any department, agency, instrumentality or municipality." P.R. Laws Ann. tit. 22, § 903 (Supp. 1983). These facts indicate that the PBA's mission is of a sort that might well involve the agency in the political process. "Where, how, and when the government will repair or reconstruct public buildings, which towns will have which priorities, when and where money is to be spent, may well be a matter of considerable interest to government officials including political leaders." *Juarbe Angueira*, 831 F.2d at 15. It is no exaggeration to say that elections often turn on the success or failure of the incumbent to provide public services such as those provided by the PBA. *See, Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985). That party affiliation is an appropriate requirement for the effective performance of a job of this nature can hardly be questioned.

In March 1985, respondent, acting pursuant to the provisions governing the civil service system of the Commonwealth, dismissed petitioner from the position of Regional Director.[3] Petitioner subsequently sued

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[3] Under the Puerto Rico Public Service Personnel Act of 1975, P.R. Laws Ann. tit. 3, §§ 1301-1431 (1978), that establishes a

respondent claiming that he had been dismissed for political reasons in violation of the First and Fourteenth Amendments to the Constitution of the United States. *Branti v. Finkel*, 445 U.S. 507 (1980) ("*Branti*"); *Elrod v. Burns*, 427 U.S.347 (1976) ("*Elrod*").

Respondent moved for summary judgment to dismiss the damage claim. He said that the dismissal either was legal or its illegality in early 1985, was, at least, unclear and therefore he was protected from suit by qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982) ("*Harlow*"); *Davis v. Scherer*,

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modern civil service system in Puerto Rico, all government employees are classified in one of two categories: career employees and confidential (trust) employees. *Id.* § 1349. Under the statute, the position of Regional Director is classified as a confidential position or a position of trust. *Id.* § 1350. Employees in these positions have no property right, but are "of free selection and removal." *Id.* Confidential positions constitute a restricted category that cannot surpass 25 such positions per agency, except in extraordinary circumstances due to the size or complexity of the agency. *Id.* § 1351. All other positions are classified as career positions. *Id.* § 1352. Confidential positions are restricted to those positions that "intervene or collaborate substantially in the formulation of public policy, who advise directly or render direct services to the head of the agency." *Id.* § 1350. The objective of this restricted category is to "assure that the government has adequate means, through the wise and restricted use of the confidential service, to implement the public policy validated by the majority. . . ." *Id.* §1312(5).

The civil service system of Puerto Rico is a carefully wrought system for the administration of government personnel. It is the end result of the hard fought efforts of many years aimed at establishing merit as the principle that shall govern the entire system. *Id.* § 1311. The people of Puerto Rico justly feel proud of this accomplishment.

468 U.S. 183, 190-97 (1984) ("*Davis*"); *Anderson v. Creighton*, ___ U.S. ___, ___-___, 107 S. Ct. 3034, 3037-40 (1987) ("*Anderson*"); *De Abadía v. Izquierdo Mora*, 792 F.2d 1187 (1st Cir. 1986); *Méndez-Palou v. Rohena-Betancourt*, 813 F.2d 1255 (1st Cir. 1987). The United States District Court for the District of Puerto Rico denied respondent's motion. Respondent appealed that interlocutory decision. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

On September 29, 1987, after full briefing and oral argument, the court of appeals reversed the judgment of the district court in respect to the issue of qualified immunity. The First Circuit, in a well reasoned opinion, correctly held that at the time of the dismissal in March, 1985, the law was unclear. "That is, as of that time one could not say that the dismissal was *clearly* unlawful. And, only where the action in question is *clearly* unlawful does a defendant lose his qualified immunity." *Juarbe Angueira*, 831 F.2d at 12, *citing Harlow v. Fitzgerald*, 457 U.S. at 818. Petitioner then sought review from this Court, seeking to overturn the decision of the First Circuit.

REASONS FOR DENYING THE WRIT

I. "The First Circuit's Decision Is Not in Conflict with the Decisions of this Court or of any Federal Circuit Court of Appeals, Because for Purposes of Qualified Immunity the State of Preexisting Federal Constitutional Law Is Not Determined Exclusively by Reference to the Opinions of the State's Supreme Court.

Petitioner presents a single argument to justify the grant of certiorari. He merely claims, without citing any case law for the proposition, that the determination of whether or not the preexisting law is clearly

established for purposes of the qualified immunity doctrine is to be made in this case exclusively by reference to the opinions of the Supreme Court of the Commonwealth of Puerto Rico. According to petitioner, all of these decisions clearly established that a regional director such as himself, was protected under the First Amendment from a politically based discharge for purposes of the *Elrod-Branti* doctrine. Therefore, he argues, the First Circuit committed reversible error when it failed to follow those decisions, and instead decided that respondent's actions were not clearly unlawful on the basis of its interpretation of the decisions of this Court and of numerous decisions by other courts of appeals.

Petitioner's sole argument is simply wrong. Contrary to his unfounded allegations, a reading of the opinion in *Juarbe Angueira* clearly demonstrates that it is consistent with this Court's qualified immunity decisions in *Harlow*, *Davis* and *Anderson*, as well as with a considerable body of case law from courts of appeals and district courts that have applied the qualified immunity doctrine, as well as the *Elrod-Branti* doctrine. Simply stated, there is no conflict and no justification for this Court's intervention.

First. Petitioner conveniently overlooks the fact that this Court has never sustained the proposition he advances, that the state of the law is to be evaluated solely by reference to the opinions of a single state's supreme court. Although the Court has articulated the rule of qualified immunity, it has not fully explained what it means by the phrase "clearly established law". Indeed, it has not specified which court one must look to in determining whether a right is clearly estab-

lished. *See Benson v. Allphin*, 786 F.2d 268, 275 (7th Cir. 1986).

In an often quoted footnote in *Harlow*, the Court declared that it "need not define here the circumstances under which the 'state of the law' should be 'evaluated by reference to the opinions of this Court, of the Court of Appeals, or of the local District Court.'" *Harlow*, 457 U.S. at 818 n. 32, *quoting Procunier v. Navarette*, 434 U.S. 555, 565 (1978). It is clear that petitioner's proposition is not sustained by the opinions of this Court in *Harlow* and *Procunier*.

If anything can be intimated from the opinions cited above is that the lower courts should not limit themselves to any set of decisional law when identifying what constitutes clearly established law. The Court's recent decision in *Anderson v. Creighton*, __ U.S. __ , 107 S. Ct. 3034 (1987) lends support to this conclusion. In this case, the Court held that for the qualified immunity standard to operate, the relevant legal rule cannot be identified at a high level of generality. The "right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right;" *id.* at 3039, "the unlawfulness must be apparent." *Id.*

The Court in *Anderson* rejected a proposition similar to petitioner's, which the Court characterized as procrustean: that qualified immunity be rejected on the basis of a common law strict liability rule that was applied to officers conducting searches of innocent third parties' homes. The Court reasoned that since qualified immunity is "intended to provide gov-

ernment officials with the ability 'reasonably [t]o anticipate when their conduct may give rise to liability for damages;" *id.* at 3042, that security would be "utterly defeated" if officials were unable to determine whether they were protected by the immunity "without entangling themselves in the vagaries of the English and American common law." *Id.*

In this case, petitioner's contention, if it were to be accepted, would require that government officials entangle themselves into the vagaries of state court interpretation of the protection afforded by state constitutional law or the First Amendment, to government employees who claim that they were dismissed for political reasons, in order to determined whether they are protected by qualified immunity from a claim raised in federal court on the basis of federal law. And, in addition, the government official would be prevented from considering the opinions of other federal courts when evaluating their conduct. Such a proposition is not only contrary to *Harlow*, *Davis* and *Anderson*, but it is simply too absurd to justify this Court's intervention.

Second. The First Circuit's decision to evaluate the state of the law by reference to decisions of this Court, of the courts of appeals and district courts, follows the practice adopted by other courts of appeals faced with the rather difficult issue of defining "clearly established law." *See, e.g., Benson v. Allphin*, 786 F.2d at 275 (reliance on Supreme Court decisions alone might be inappropriate because they are infrequent in comparison to decisions of the district and appellate courts); *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985) (in the absence of binding precedent, a court should look to all decisional law avail-

able); *People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 144 (3d Cir. 1984) (apply general, well developed legal principles). *See also, Hobson v. Wilson*, 737 F.2d 1, 26 (D.C. Cir. 1984) (law clearly established if illegality of the conduct alleged is well-established by any definition of the phrase). *Cf. Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir.) (immunity allowed where law not authoritatively decided by the Supreme Court, the "appropriate" court of appeals, or the highest state court), *cert. denied*, 451 U.S. 969 (1981).[4]

II. "The Decision of the First Circuit Is Not in Conflict with any Federal Question Decided by the Supreme Court of Puerto Rico.

Petitioner incorrectly argues that the decision of the First Circuit in this case conflicts with decisions of the Supreme Court of Puerto Rico on the same federal question—the application of *Elrod* and *Branti* to government employees, and that in so doing the court of appeals has established a double standard. (Ptn. 11) There is no such conflict. The decisions of the Supreme Court of Puerto Rico cited by petitioner are based on that court's interpretation of the Constitution of Puerto Rico. *See Colón v. C.R.U.V.*, 115 P.R. Dec. 503 (1984); *Clemente González v. Department of Housing*, 114 P.R. Dec. 763 (1983); *Franco v. Municipality of Cidra*, 113 P.R. Dec. 260 (1982); *Ramos Villanueva v. Secretary of Commerce*, 112 P.R. Dec. 514, *cert. denied* 459 U.S. 908 (1982); *Diaz de*

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[4] Other examples of the experience had by the lower courts in following *Harlow* are discussed in Comment, *Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. Pa. L. Rev. 901 (1984).

Llobet v. Office of the Governor, 112 P.R. Dec. 747 (1982). *See also, Olivieri v. Pierluissi*, 114 P.R. Dec. 23 (1983), which is not cited by petitioner.

Petitioner insists, but hardly demonstrates, that in these opinions the Supreme Court of Puerto Rico based its decisions on the First Amendment to the United States Constitution, and that those decisions determine a "clearly established law" that is in direct conflict with the First Circuit's decision. This argument seems to ignore the fact, as demonstrated by a careful reading of any of the decisions relied on by petitioner, that what the Supreme Court of Puerto Rico is doing is interpreting the Constitution of the Commonwealth.

The First Circuit has considered many of the opinions cited by petitioner, on the several occasions it has had to deal with the same issue here in question.[5] The court has held correctly that those cases, based on Puerto Rican law, are not conclusive as to the

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[5] Since 1985 Puerto Rico presents a unique situation. From the first months of 1985 to the summer of 1986 about 319 former government employees have brought civil rights suits in the federal district court claiming violations of their First Amendment rights. *Juarbe*, 831 F.2d at 14. The First Circuit has had to face dozens of interlocutory appeals from denials of qualified immunity to the government officers sued in those cases, most of whom were the heads or top level officials of practically all agencies of the Commonwealth government. In the performance of this difficult task the court of appeals has done a highly creditable job. *See, e.g., Raffucci v. Zayas*, 816 F.2d 818 (1st Cir. 1987); *Pérez Quintana v. Gracia Anselmi*, 817 F.2d 891 (1st Cir. 1987); *Monge-Vázquez v. Rohena-Betancourt*, 813 F.2d 22 (1st Cir. 1987); *Alicea Rosado v. Zayas*, 813 F.2d 1263 (1st Cir. 1987). *Cf. Vázquez Rios v. Hernández Colón*, 815 F.2d 830 (1st. Cir. 1987).

state of the federal law on this matter, *Juarbe*, 821 F.2d at 14, because "they go further than do most circuit and district court interpretations of *Elrod-Branti* in refusing to allow political firings at the higher levels of government." *Rodriguez Rodriguez v. Muñoz Muñoz*, 808 F.2d 138, 142 (1st Cir.1986).

The court of appeals has correctly pointed out that the Puerto Rican opinions frame the *Branti* issue in terms of "whether a position requires loyalty with a party's 'ideological axioms' ", *Jiménez Fuentes*, 807 F.2d at 243 n.9, which is contrary to *Elrod*'s and *Branti*'s holdings that political firing is constitutional when it serves the interests of the government, not a party organization. *Id.* at 240 and 240 n. 7. Under *Branti*, the proper inquiry is "whether the position related to partisan political interests or concerns." *Id.* at 243 n. 9. *Branti*, 445 U.S. at 519. For this reason, Puerto Rican law seems to afford a narrower exception for political dismissals.

The reason for the greater protection afforded by the Puerto Rican decisions is clear. Puerto Rico's highest court is interpreting the Constitution of Puerto Rico, and that court has always considered the Commonwealth's Constitution to provide a broader protection of civil rights than that afforded by the Constitution of the United States. *Accord, Estado Libre Asociado v. Hermandad de Empleados*, 104 P.R. Dec. 436, 440 (1975).

In sum, at most what the decisions of the Supreme Court of Puerto Rico reveal is that the First Circuit and Puerto Rico's highest tribunal may have reached differing results on the basis of their independent interpretation of different legal texts. It is not a matter of a double standard, as petitioner argues, but of

independent legal doctrines, one federal and one commonwealth, a not infrequent nor surprising occurrence in our federalism. Such divergence is too slender a reed on which to base a petition for certiorari. The petition should be denied.

III. "The First Circuit's Rejection of Commonwealth Law as the Basis to Determine Qualified Immunity from Liability Under 42 U.S.C. § 1983 Is Consistent with this Court's Decision in *Davis v. Scherer*.

Petitioner's argument that the First Circuit erred when it granted respondent qualified immunity in spite of the clearly established Puerto Rican law, flies in the face of this Court's decision in *Davis v. Scherer*, 468 U.S. 183, 193-96 (1984). Petitioner seems to forget that he is suing under 42 U.S.C. §1983 that protects only against violations of federally protected rights. *See, Monroe v. Pape*, 365 U.S. 167 (1961); *Casines v. Murchek*, 766 F.2d 1494, 1501 n. 10 (11th Cir. 1985). He also forgets that the only federally protected right he claims is a First Amendment protection from a politically based dismissal. *Juarbe*, 831 F.2d at 12. Under such set of facts, and according to *Davis*, respondent cannot be denied qualified immunity even if Commonwealth law was clearly established.

Davis indicates that unless the rights which form the basis of the plaintiff's civil rights claims were conferred by state law, a violation of state law is neither cognizable under section 1983 nor results in the forfeiture of immunity for the alleged violation of rights which have independent constitutional origin. *Davis*, 468 U.S. at 193-94, 194 n. 12. Petitioner's submission, if adopted, would disrupt the balance that this Court's decisions strike "between the interests

in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Id.* at 195. "It would become more difficult, not only for officials to anticipate the possible legal consequences of their conduct, but also for trial courts to decide frivolous suits without protracted litigation, " *id.* at 196, as they would have to become enmeshed in questions about the meaning or purpose of state law, that are often impossible to be resolved on summary judgment. Petitioner's submission should be rejected.

IV. "The First Circuit's Decision Upholding Respondent's Qualified Immunity Is Clearly Consistent with this Court's Decisions.

The court of appeals decision in this case represents a correct application of the qualified immunity doctrine established by *Harlow* and its progeny. Judge Breyer's well reasoned opinion for the court speaks for itself and needs no elaboration at this point. However, we would like to call the Court's attention to two significant points that lend support to our opposition to the grant of certiorari in this case.

First, petitioner's argument fails to recognize that *Elrod* and *Branti* marked a substantial change in the law, *De Abadia*, 792 F.2d at 1191. As is often the case, such change gives rise to a process of sharpening the lines in the law's grey areas that result from such change. *Id.* at 1190-91. In *Branti*, the Court set forth the law in highly general terms. It said that the Constitution provided protection from politically-based dismissal to public employees, but *excepted* from such protection those jobs where "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S.

at 518. But, the Court did not specify just where "party affiliation" was , or was not, "appropriate." It was difficult to predict just how the courts, in particular instances, would draw the line that the Supreme Court described in *Branti*—"a line that seeks to separate instances where (1) a newly elected political party can legitimately replace those who hold important offices in order to carry out its electoral mandate and to provide voters with the confidence it is doing so, . . . from (2) pure political patronage. . . ." *Juarbe*, 831 F.2d at 13. In sum, after *Branti*, a public official, such as respondent here, would find it extremely difficult to anticipate when his decision to dismiss a high level employee would give rise to liability for damages for a violation to a federally protected right. This is the exact situation qualified immunity is designed to protect against. *See Davis*, 468 U.S. at 195, *Harlow*, 457 U.S. at 818-19; *Butz v. Economou*, 438 U.S. 478, 506-7 (1978). The decision in *Juarbe* is a correct recognition of this fact.

Even if one were to accept, *arguendo*, petitioner's contention that the opinions of the Commonwealth Supreme Court represent authoritative interpretations of federal law, his argument must still be rejected. Petitioner's contention fails to consider the considerable body of case law from circuit courts of appeal and district courts that are contrary to the Commonwealth court's opinions. This corpus, when considered together with such opinions, adds to the uncertainty that a reasonable public official would have to face. Federal courts have been reluctant to define *Branti*'s exception too narrowly "lest they prohibit newly elected officials from implementing new policies in areas" that sound technical, but which,

"depending on time and circumstances, may become politically charged." *Juarbe*, 831 F.2d at 13. *See Tomczak v. City of Chicago*, 765 F.2d at 641. A fair reading of this body of case law, including the Commonwealth court's decisions, leads to the firm conviction that in 1985 there was very little, if any, "clearly established law" in this area.[6]

Second, the First Circuit's decision evidently, has been guided by a "practical sense for the political-governmental system in operation," *Ecker v. Cohalan*, 542 F. Supp. at 901, that allowed it to recognize the crucial role a regional director plays in the structure of the government of the Commonwealth of Puerto Rico.

In Puerto Rico, contrary to the situation existing in the states, all of the primary functions of the government have been entrusted to the Commonwealth government by the Constitution of Puerto Rico. *See* P.R. Const. art. IV; P.R. Laws Ann. tit. 3, §§ 1-451 (1982). The Commonwealth government provides all important services to the people, such as police and fire protection, public schools and universities, hospitals, transportation, including carriage of goods by

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[6] To aid the Court we have included as an addendum to this brief a list of federal court cases interpreting the *Branti* exception. It shows that through 1985, lower courts applied *Branti*'s exception broadly, finding protection against politically based dismissals only for highly technical or very low level jobs, such as a road grader operator, a bookkeeper; but that protection was usually denied to high level and middle level employees. Particularly lacking the requisite clarity in the law were those cases involving the "troublesome middle tier" of the *Elrod-Branti* spectrum. *See, De Abad'a*, 792 F.2d at 1194 (Campbell, C.J. concurring).

sea, libraries, all public utilities, such as electricity, telephone, water and sewage services, not to say housing, welfare and other social services, industrial and agricultural development and production, and so on. About the only thing the Commonwealth government does not do is pick-up the garbage, which is a function traditionally entrusted to the municipal governments. In short, in Puerto Rico the government at the state level has been entrusted with those functions that in the United States are usually in the hands of local government units, such as counties or municipalities. *See, e.g., Tomczak v. City of Chicago*, 765 F.2d at 641.

In the United States, the issue in this type of case arises in the context of much simpler government structures, usually below the state level. *See, e.g., Soderbeck v. Burnett County*, 752 F.2d 285, 288 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985) (the sheriff's confidential secretary); *Nekolny v. Painter*, 653F.2d 1164, 1169-70 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (senior citizens' coordinator of township may qualify as policymaker); *Ness v. Marshall*, 660 F.2d 517, 520-23 (3d Cir. 1981) (city solicitor and assistant city solicitor were policymakers); *Ecker v. Cohalan*, 542 F. Supp. 896, 900-03 (E.D.N.Y. 1982) (chief deputy commissioner of parks was both a policymaking and confidential employee). Also, one should not forget that in the United States many of the regional, municipal and other local government units are headed by elected officials. In Puerto Rico a radically different situation exists, as the only elected official of the executive branch is the Governor, and there are no elected officials at the regional level. Therefore, any newly elected Governor must rely ex-

clusively on appointed officials in order to put his party's program into effect.

Most agencies of the Commonwealth government, such as the PBA in this case, are decentralized and perform many functions at a regional level. The agency's regional directors are responsible for planning, coordinating, and managing the agency's programs at the regional level. They supervise a regional staff that may range to dozens employees, as happens in this case. Such positions are the natural source for influential recommendations of changes in policy, and act widely as public speakers and educators regarding the state programs, thereby serving as pipeline and advocates at the municipal and regional level. In short, the position of regional director is an indispensable component in the structure of the government of the Commonwealth.

Given the functions and importance the position of regional director involved in this case, as compared to those of the many positions found by numerous federal courts to be subject to the *Branti* exception, the First Circuit's conclusion that the law was anything but clearly established regarding the illegality of respondent's conduct, was eminently correct. Review by this Court is unnecessary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ADDENDUM

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"The Spectrum of Public Employment From the Point of View of Political Dismissal Cases in the Federal Courts.

(From *Illinois State Union Council v. Lewis*-1972 to *Jiménez Fuentes v. Torres Gaztambide*-1986)

I. The following cases illustrate the lower part of the spectrum wherein the courts found the employees' positions involved protected from politically based dismissal:

A. In cases involving sheriffs' employees: *Elrod v. Burns*, 42 U.S. 347 (1976) (Chief Deputy, Process Division, Supervisor, 7th fl. Sheriff Dept. Bailiff and Security Guard, Cook County Juvenile Court, Process Server, employee); *Mcbee v. Jim Hogg Cty. Texas*, 730 F.2d 1009 (5th Cir. 1984) (Deputy Sheriff, Dispatcher, Dispatcher Secretary); *Jones v. Dodson*, 727 F.2d 1320 (4th Cir. 1984) (Deputy Sheriff, Dispatcher); *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981) (Under Sheriff); *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981) (Sargent in the Criminal Investigation Division); *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980) (Deputy Sheriff Secretary); *McCollum v. Stahl*, 479 F.2d 869 (4th Cir. 1978) (Deputy Sheriff); *Ramey v. Harber*, 431 F. Supp. 657 (D.W.D. Va. 1977) (Deputy Sheriff).

B. Cases involving lawyers: *Branti v. Finkel*, 445 U.S. 507 (1980) (County Assistant Public Defenders).

C. Cases involving technical or low level positions: *Shondel v. McDermott*, 775 F.2d 859 (7th Cir. 1985) (Receptionist); *Horton v. Taylor*, 767 F.2d 471 (8th Cir. 1985) (Road Grader Operator); *Grossart v. Di-*

naso, 758 F.2d 1221 (7th Cir. 1985) (Bookkeeper); *Barnes v. Bosley*, 745 F.2d 501 (8th Cir. 1984) *cert. denied*, 471 U.S. 1017 (1985) (Three(3) Deputy Circuit Clerks of St. Louis City); *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981) (Bus Driver, Secretary Dispatcher); *Illinois State Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972) (94 employees of diverse nature e.g. elevator operators; janitors, secretaries, etc.); *DeLa Cruz v. Pruitt*, 590 F. Supp. 1296 (N.D. 2nd. 1984) (Supervisor of branch of auditor's office); *Miller v. Board of Education*, 450 F. Supp. 106 (D.W. Va. 1978) (School Principal, Bus Drivers for the Board of Education, Bus Drivers, Lubrication Boy, Cooks).

II. There are some cases that fall within the middle tier of the spectrum:

A. Cases including sheriffs' employees: *Mele v. Fahy*, 579 F. Supp. 1576 (D.NJ. 1980) (Police Director); *Joyner v. Lancaster*, 553 F. Supp. 809 (D.M.D.N.C. 1982) (Captain in the Sheriff's Office).

B. Cases involving other positions: *Meeks v. Grimes*, 779 F.2d 417 (7th Cir. 1985) (Bailiffs of the Gary City Court of Indiana); *Soderbeck v. Burnett Cty. of Wisconsin*, 752 F.2d 285 (7th Cir. 1985) (Not Confidential Secretary); *Stegmaier v. Trammell*, 597 F.2d 1027 (5th Cir. 1979) (Deputy Circuit Clerk).

III. The higher part of the spectrum consists of the cases where the courts have found that the following positions are subject to removal based on their political affiliation:

A. Cases involving lawyers: *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983) (Assistant State Attorney); *Mummau v. Ranck*, 687 F.2d 9 (3d Cir. 1982) (Assistant State Attorney); *Ness v. Marshall*, 660 F.2d

517 (3d Cir. 1981) (City Solicitor, Assistant City Solicitor); *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977) (Deputy City Attorney); *Alfaro de Quevedo v. de Jesús Schuck*, 556 F.2d 591 (1st Cir. 1977) (Director Office of Criminal Justice, Department of Justice of P.R.); *Bavoso v. Harding*, 507 F. Supp. 313 (D.S.D.N.Y. 1980) (City Corporation lawyer).

B. Cases involving state directors: *Awtry v. U.S.*, 684 F.2d 896 (Ct. Cl.. 1982) (State Executive Director of Agricultural Stabilization and Conservation Service); *Committee to Protect First Amendment Rights v. Bergland*, 626 F.2d 875 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) (State Director FHMA, State Director of Agricultural Stabilization and Conservation Service); *Brunton v. United States*, 518 F. Supp. 223 (S.D. Ohio 1981) (State Director of FmHA)

C. Other miscellaneous cases: *Jiménez Fuentes v. Torres Gaztambide*, 807 F.2d 236 (1st Cir. 1986) (Regional Director of the Urban Development and Housing Corporation); *Brown v. Trench*, 787 F.2d 163 (3d Cir. 1986) (Assistant Director of Public Information for Bucks County); *Tomczack v. City of Chicago*, 765 F.2d 633 (7th Cir.) *cert. denied* 474 U.S. 946 (1985) (First Deputy Commissioner of the Dept. of Water); *Shackman v. Democratic Organization of Cook County*, 722 F.2d 1307 (7th Cir. 1983) (City Park Superintendent of Employment); *Sweeney v. Board*, 669 F.2d 542 (8th Cir.) *cert. denied*, 459 U.S. 878 (1982) (fee agents); *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981) (Senior Citizens Coordinator); *Shaw v. U.S.*, 640 F.2d 1254 (U.S.C.C. 1981) (Deputy Assistant Secretary of Defense); *Norbeck v. Davenport*, 545 F.2d 63 (8th Cir. 1976) (School Principal); *Rivera Morales v. Benitez de Rexach*, 541 F.2d 882 (1st Cir. 1976) (As-

sistant Secretary of Education); *Indiana State Employees Ass'n v. Negley*, 501 F.2d 1239 (7th Cir. 1974) (Employees of the Indiana Dept. of Instruction. e.g. consultants and coordinators for Federal Projects); *Ecker v. Cohalan*, 542 F. Supp. 896 (E.D.N.Y. 1982) (Chief Deputy Commissioner of Parks, Conservation and Recreation); *Besig v. Friend*, 460 F. Supp. 134 (N.D.Ca. 1978) (Member of City Recreation and Park Comm'n); *Gould v. Walker*, 356 F. Supp. 421 (N.D.Ill. 1973) (Assistant Directors and Coordinators for Special Education for the Governor's Office of the state of Illinois).